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THE DICKINSON SOCIETY.

Since the last issue of the FORUM appeared the time for the regular meeting of this society has been pretty well occupied by lectures, as will be seen under another head. When such lectures were given the society held but short meetings to transact the necessary business of the organization. On the evening of Friday, Feb. 9, the society, however, held a regular meeting. The question for debate on this occasion was: "Resolved, That a uniform system of examinations, for those who wish to practice at the various bars of this State, is desirable." This resolution was discussed affirmatively with much earnestness and vim by Messrs. John and Henderson. Messrs. Stauffer and Trude creditably upheld the negative. After this disqussion Mr. Shellenberger entertained the society by delivering a comic recitation of no small excellence.

WEORCAN CLUB.

The Weorcan Club still continues its reading of Shakespeare's Hamlet, studying and criticising the work as it reads. The members fully appreciate the profit which they are gathering from the perusal of this drama, and are determined to continue in the work until the end of the school year.

Through the efforts of Mr. Hess and the other members of the executive committee, several new features have been added to the programmes. One of these is the assignment of some subject which will increase ones control of the English language to one of the members, and letting him give a talk on that subject, thus serving the two-fold purpose of increasing the knowledge of the club at the expense of the time and labor of but one of its members, and giving that member training in English composition and the delivery of a talk. Another is the discussion of interesting subjects of the day, the merit of which is very obvious. The third of these is both novel and profitable. It consists in the appointment of suitable persons to note errors in particular lines and to call the attention of the club and the members to such errors. This plan is one of the best which the Club has thus far devised. Gradually the executive committee will add new departments to this system of criticism until at least a majority of errors of language, whether in grammar, rhetoric, logic, pronunciation or elocution are carefully noted and pointed out to those who make them. It is difficult to see what the far-reaching results of this system of criticism will be.

DR. REED'S LECTURE.

On the evening of Friday, Jan. 26th, Dr. Reed, at the request of the Allison Society, delivered the second lecture of his series on "Some Phases of Public Speaking." He was greeted with a large and enthusiastic audience. The "boys" are always glad to hear the President of the Law School, since they can learn probably as much from his eloquent style as they can learn from the words which he speaks.

The lecture was opened by dividing public speakers into four classes: First, those who write out their discourse, and afterwards read it from the rostrum; secondly, those who write out their discourse, and then memorize it and deliver it from memory; thirdly, those who think out their discourse, arrange it logically in their minds, and then speak from what they have thus gathered and arranged; and lastly, those who speak in a truly impromptu manner, not having made any preparation whatever, whether in a general way or for the special occasion.

Dr. Reed strongly condemned this last mode of speaking, since it leads but to "words, words, words." On the other hand, he very emphatically urged the practice of that other kind of speaking, commonly known as impromptu, namely, that in which the material for the speech is gathered beforehand, and the manner of rendition only is left to the occasion. This method is very necessary to the lawyer, since most of his legal work will be just in this line.

For a set, formal speech, especially in the forepart of a man's career, Dr. Reed advised the first method, since it removes any anxiety of the failing of the memory, invariably accompanying the second method, and gives the advantage of a carefully prepared discourse. The third method was advised for those who can master it, though they must needs be few. The reading of the English Bible, the English Dictionary and Bunyan's Pilgrim's Progress were forcibly urged.

He closed with a masterly delivery of a portion of Shields' speech in defense of the Irish, delivered in the British Parliament.

THE ALLISON SOCIETY.

Affairs in this society are very flourishing. The attendance has increased, and the interest shown by the members in the work and welfare of the society is encouraging. During the past month the meetings have been helpful, and the programmes exceptionally interesting.

On January 26th a lecture was given in the large lecture room on "Extemporaneous Speech," by Dr. Reed, before the combined societies. The lecturer gave an exceedingly interesting and able talk on the various forms and the best methods of public speaking, concluding with an eloquent recitation illustrating his lecture.

At the next meeting of the society Messrs. Piper, Bolte and Harpel were appointed by President Valentine, as a committee to confer with the Dickinson Society, and were empowered to renew the suspended negotiations for an inter-society debate, which event the members of the Allison are unanimously in favor of. The same evening both the societies listened to an able and interesting lecture by the Hon. Wm. Penn Lloyd, on the topic, "The Banker and the Lawyer."

The program of February 9th was a particularly interesting and helpful one, the debate being on the question of reform in the present election laws. A declamation by Mr. Wm. A. Warner was received with much applause, and responded to with a masterly rendering of "Sheridan's Ride."

A general debate on the case "Commonwealth vs. Bell" was participated in by Messrs. Bolte, Coblentz, Valentine, Brock, Heist, Rothermel, Harpel, Barr and Dr. Stauffer, the speakers confining themselves to the rulings on the various points of law.

Mr. Silas Elder, Jr., has been received into the membership of the society. Mr. Piper, as chairman of the committee, reported that as yet no satisfactory arrangements have been concluded in the matter of the inter-society debate, he being unable to induce the Dickinson Committee to meet that of the Allison. We trust these arrangements may be made in the near future.

LECTURE BY HON. WILLIAM PENN LLOYD.

"The Lawyer and the Banker" was the subject of one of the most interesting and entertaining lectures it has been the pleasure of the Faculty and students of the Law School to hear. Prominent lawyers and bankers of Carlisle and surrounding towns also availed themselves of the opportunity to hear such an able address by one who has had fifteen years' experience as a banker in the Dauphin Deposit Bank of Harrisburg, and twenty years' actual practice in the profession of the law. It was delivered on Friday evening, Feb. 2, by Ex-State Senator William Penn Lloyd, Esq., of Mechanicsburg, Pa., a prominent member of the Cumberland County Bar and Treasurer of the Pennsylvania Bar Association.

Mr. Lloyd is a man of wide and varied experience. His life has been one of unusual scope. In his early career he was for a time a teacher in the public schools. He served through the rebellion, going out as a private in the ranks of a cavalry regiment, and coming back as its adjutant. He has been a Lieutenant Colonel of the National Guards, United States Revenue Collector for the 15th Congressional District, and has written a history of his regiment.

In opening his address Mr. Lloyd said that many people supposed the banker and the lawyer to be a dangerous combination, the former having the opportunity to cheat, and the latter knowing how to do so, that both had their troubles, the banker with the depositor, the lawyer with his client.

He showed how the bank is a blessing to the community in teaching the people. First, that there is a right time to do a thing; second, that expenditure should be kept behind income, and that people who do not meet their obligations are not respected by the banker or the community; thirdly, that in business there shall be no preference, whether on account of church, politics, friendship or kinship; and, fourthly, that people be careful in their business transactions.

He then gave a general review of banks from the founding of the first bank down to the present time, including the founding of the Bank of North America by Robert Morris, the chartering and rechartering of the Bank of the United States, the refusal of a charter by the Jackson administration, and the establishing of the national banking system in 1864, giving also statistics of banks, and their resources at the present time, and information concerning the American Bankers' Association, and its under-associations.

He closed with a general defense of banks and wealth, claiming that their charities should rob them of their bad reputation. He claimed as much patriotism for the wealthy as for their poorer brethren, showing how the Government was saved by the patriotic efforts of Robert Morris during the Revolution, of Stephen Girard during the War of 1812, and of banks in general during the Mexican, Civil and Spanish-American wars.

One of the students of this School intends practicing in the West. He is in receipt of a letter from a prominent business man of St. Louis. As showing the esteem in which our School is held throughout the country we quote from his letter. In speaking of the Dickinson School of Law he has this to say:

"I have talked with several attorneys who stand at the head of the profession here, * * * and it is recognized here as a first-class School with a strong Faculty. * * * If you have a diploma from the Dickinson School of Law, to be admitted to the bar here will be a very easy matter."

DELTA CHI FRATERNITY.

Two more men from the Junior class have been initiated during the past month, William T. Osborne, of Jermyn, Pa., and Hamilton D. Gillespie, of Philadelphia.

ALUMNI NOTES.

Garrett Stevens, '99, spent a few days in Carlisle during January.

Hermann Sypherd, '99, has passed his examination for admission to the Wilmington bar. He made a very high average. It is said that he intends to practice in Atlantic City.

Stevens, '99, has presented to the Library a History of Common Law of England, by Matthew Hale, published in 1713.

J. F. Biddle, '97, is county solicitor to the commissioners of Bedford county. He is also a member of the bar committee. Mr. Biddle has been taking an active part in politics, and has recently made a number of speeches in support of Mr. Thropp, nominee for Congress.

ATHLETICS.

The baseball squad has been having light training for the past week or so. The Law School contributes a number of candidates, prominent among whom are Rothermel, McGuffie, Lauer, Boryer and Adamson. It is the intention of the management to have a second team this year, with its own schedule of games.

There has been a call issued for men from the Law School to compete for places on the track team. There are a number of men of ability in various forms of track athletics in the school, and it is to be hoped that they will respond to the call.

Gen. Horatio C. King, of Brooklyn, has kindly presented to the Library a set of the Central Reporter and other valuable books.

MOOT COURT.

JOHN PATTON vs. WILLIAM SCOTT.

Mitigation of damages.— Fraud — Mesne profits.

STATEMENT OF THE CASE.

Patton, thinking land had a valuable ore in it, bought it for $2,000. If the ore was there, it was in fact worth $25,000. After buying it, he engaged Thomas Sergeant to make tests. Sergeant discovered indications of large deposits, and colluded with Scott to represent to Patton that no ore was present, and thus induce Patton to sell. Patton, influenced by Sergeant's report, said he would sell, and Scott offered to buy it for $1,000. Patton accepted, and the conveyance was made. Patton went to Europe, remaining there two years. Meanwhile Scott had developed the ore and taken out 20,000 tons of it, and sent it to a distant market. He sold it for $50,000. The expense of extracting it was $10,000, and the cost of transporting it to the market where it was sold was $2,000. On Patton's return, learning of Sergeant's and Scott's fraud, he brought this ejectment, claiming *mesne* profits, after having tendered to Scott the $1,000, with interest. Defendant asks the court to say, (1) the possession cannot be recovered; (2) nor *mesne* profits; but, if any, then only the value of the ore, less the expense, *i. e.*, $50,000 minus $12,000.

LAVENS and RILEY for the plaintiff.

1. One induced to enter into a contract by fraud, may rescind the contract and recover the property parted with. Cobb v. Hatfield, 46 N. Y. 533; Burns v. Dockary, 156 Mass. 135.

2. The plaintiff can recover mesne profits. Ege v. Hill, 84 Pa. 333; Phillips v. Coast, 130 Pa. 572.

3. Defendant cannot set off his improvements in mitigation of damages. Wordhall v. Rosenthal, 61 N. Y. 393; Wood v. Wood, 83 N. Y. 575.

LIGHTNER and JOHNSON for the defendant.

1. A plaintiff in ejectment will not be permitted to recover the mesne profits in the same action, unless he gives previous notice of said claim. Reiff v. Rapp, 2 W. & S., 27.

2. Defendant used no fraudulent means to acquire property, as he was not bound to divulge its value to him. Harris v. Tyson, 24 Pa. 358.

OPINION OF THE COURT.

I. There can be no doubt that the conveyance from plaintiff to defendant was obtained by fraud. It appears that Sergeant and Scott deliberately entered into a conspiracy by which Sergeant, who was under a duty to tell the truth to plaintiff, was to misrepresent the value of the land, and Scott was to purchase it. The execution of such a conspiracy is obviously deceit, and a conveyance thereby obtained is consequently voidable. It is equally clear that where lands are held under a conveyance voidable by reason of having been obtained by fraud, ejectment may be maintained for their recovery. Rankin v. Porter, 7 Watts 387; Am. & Eng. Encyc. of Law, 2nd Ed., Vol. 10, p. 520.

II. That mesne profits may be recovered in ejectment was settled by Dawson v. McGill, 4 Whart. 230, in which Chief Justice Gibson gave the matter very careful consideration. It is true, as defendant contends, that evidence of mesne profits should not be admitted unless notice is given in time for preparation to encounter it. Cook v. Nicholas, 2 W. & S. 27. But surely it is sufficient notice when the claim is made at the time of commencing the action.

As to the amount of mesne profits recoverable in this case, discussion is precluded by the decision in Foster v. Weaver, 118 Pa. 42. There a tenant in common of an oil leasehold was fraudulently deprived of his interest by his co-tenant. The land was subsequently recovered by the plaintiff, and in an action for mesne profits it appeared that the expenses of operation exceeded the value of the oil pumped. The court held that the plaintiff was entitled to recover the value of his share of the oil pumped, without regard to the expenses incurred by the wrong-doer, Mr. Justice Sterrett declaring that no other answer to the question could be given, "unless it is the policy of the law to make the way of the transgressor easy and secure."

Judgment for plaintiff.

SAMUEL BACON vs. JOHN HITCHCOCK.

Estates in entirety—Parol gifts—Statutes of limitations against married women

STATEMENT OF THE CASE.

John Bacon and his wife, Sarah, owned a farm, which had been conveyed to them by a deed containing the words, "hath granted, bargained, sold, etc., unto John Bacon and Sarah Bacon, their heirs and assigns." On October 3, 1867, they orally gave the farm to their son, Joseph, and put him at once into possession, they retiring to another farm. Joseph retained exclusive possession, and making improvements which increased the value of the farm from $4,000 to $15,000. On February 13, 1878, he conveyed it to Hitchcock for $15,500, who at once took, and since continued in possession. On June 8, 1889, John Bacon died, and on June 8, 1897, Sarah died. On Sept. 1, 1897, Samuel Bacon, the brother of Joseph, began this ejectment.

O'KEEFE and Miss MARVEL for the plaintiff.

1. An estate by entireties arises whenever an estate vests in two persons, they being, when it vests, husband and wife. Bramberry's Appeal, 156 Pa. 628; French v. Mehan, 56 Pa. 286; McCurdy v. Canning, 64 Pa. 39.

2. A married woman may divest herself of her real estate only in the manner prescribed by statute. Stivers v. Tucker, 126 Pa. 74; Davison's Appeal, 95 Pa. 394; Innes v. Templeton, 95 Pa. 262.

3. This action is not barred by the statute of limitations. Updegrove v. Blum, 117 Pa. 259; Way v. Horton, 156 Pa. 22, and cases cited.

PIPER and SLOAN for the defendant.

1. A parol gift of land by a father to his son, accompanied with possession, and followed by valuable improvements, is valid, notwithstanding the statute of frauds. Moore v. Small, 19 Pa. 461; Syler and Wife v. Eckert, 1 Binney 377; Eckert v. Eckert, 3 Penrose & Watts 332.

2. The eleven years' possession of Joseph Bacon may be tacked on to that of John Hitchcock, and this action is barred by the statute of limitations. Cunningham v. Patton, 6 Pa. 355.

OPINION OF THE COURT.

By the conveyance to Samuel Bacon and Sarah, his wife, an estate in entirety was vested in them.

"A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife." Bramberry's Estate, 156 Pa. 632. That there has been no modification of this common law rule, by recent legislation, in reference to the rights and powers of married women is recognized in the opinion of the Supreme Court, delivered by Justice Williams in 1895 in Young's Estate, 166 Pa. 650. Holding the estate by entireties, upon the decease of John Bacon, the husband, his wife, Sarah, as survivor, took the whole estate. French v. Mehan, 56 Pa. 288; Bramberry's Estate, *supra*.

But it is contended that a parol gift was made of the farm to the son of the owners above named, and that valuable improvements were subsequently put upon the property, and that this precludes a recovery by the plaintiff, who claims through them, or the survivor of them. That a valid parol gift of lands may be made by

a father to his son, accompanied with possession, and followed by the making of improvements by the son on the land, was determined in Syler v. Eckert, 1 Binney 397, and this determination has been since adhered to. But in the present case it was not in the power of John Bacon to dispose of the whole or any part of the farm without the assent of his wife. French v. Mehan, *supra;* McCurdy v. Canning, 64 Pa. 39. No such consent was given by the wife to the gift to Joseph Bacon, which divested her title to the land.

"A married woman can only convey real estate in the precise statutory mode conferring the power." Innes v. Templeton, 95 Pa. 262; Stivers v. Tucker, 126 Pa. 74.

Nor would her acts and declarations have estopped her, nor will they estop the plaintiff claiming under her, from asserting title to the land. Davison's Appeal, 95 Pa. 394.

There is no statute of limitation which bars a recovery, even if it had begun to run on October 3, 1867, at the time of the gift to Joseph Bacon. Thirty years had not elapsed when the present action was instituted.

Besides, John Bacon did not die until 8th June, 1889, and it was only then that his wife became seized of the whole farm, before which we are of the opinion that the statute would not begin to run against her.

The plaintiff therefore is entitled to recover the one-half of the farm which descended to him and his brother, Joseph, under the intestate laws upon the death of their mother, Sarah Bacon.

WM. HIPPLE vs. JACOB GORDON.

Administrator's sale—Rent.

STATEMENT OF THE CASE.

Adam Hipple leased to Gordon his farm for four years, beginning April 1st, 1894, at the rent of $300 per year, payable at the end of each year, and died April 27th, 1894, insolvent. Seven months after his death his widow, the administratrix, obtained an order of the Orphans' Court to sell the farm, in order to raise money to pay the debts.

The sale was made in February, 1895, on the terms that 33⅓ per cent. of the purchase money be paid down; 33⅓ per cent. at the confirmation of the sale, and the remaining 33⅓ per cent. one year thereafter, when the deed should be delivered in conformity with the court's order. The sale was reported to the court, and by it confirmed on March 11th, 1895. On the same day the second 33⅓ per cent. of the purchase money was paid.

On March 11th, 1896, the last 33⅓ per cent. was paid, and the administratrix delivered the deed.

The installments of rents, after the sale, in February, 1895, were paid by Gordon to the purchaser (William Soper).

This is assumpsit by William Hipple, the only child of Adam Hipple, to recover the same installments.

WALTER TAYLOR and KLINE for the plaintiff.

1. The title is in the heir until confirmation, delivery of deed, and payment of the entire purchase price. Biggert's Est., 20 Pa. 17; Lesher v. Gardner, 3 W. & S. 313; 69 Pa. 118; McReis' Appeal, 6 Phila. 75.

2. Rent falling due April 1, 1895, should have been paid to the heir. Cobel v. Cobel, 8 Barr 342; McDowell v. Addams, 45 Pa. 430; Hawk v. Stouch, 5 S. & R. 156.

MURR and SHREVE for the defendant.

1. A sale, even after confirmation, does not divest absolutely the title of the heirs for it remains in the power of the Orphans' Court until a deed has been executed and delivered. Lesher v. Gardner, 3 W. & S. 314; Johnson's Appeal, 18 W. N. C. 202; DeHaun's Appeal, 156 Pa. 612.

OPINION OF THE COURT.

The plaintiff, as the only child and heir of William Hipple, was entitled to the rents and profits of the real estate of which his deceased father died seized, until his title to the same was divested by a sale and a conveyance thereof to the grantee.

"The heir of the lessor is entitled to demand and receive the rents which may become payable after the decease of the latter." Johnson v. Smith, 3 P. & W. 500. The title of the owner is not divested by mere confirmation of the sales. A deed to the purchaser is necessary to effect this. Lesher v. Gardner, 3 W. & S. 314, Emerick's Estate, 172 Pa. 195.

A decedent's heirs are entitled to the rents accruing from real estate of which he dies seized, between the date of the con-

firmation of an Orphans' Court sale, and the date when the deed is delivered to the purchaser, and the payment of such rents to the purchaser is no defense to an action by the heirs therefor. Strange v. Austin, 134 Pa. 96. But, while the plaintiff is entitled to the rent which had accrued and was payable at the time of the delivery of the deed on March 11th, 1896, yet he is not entitled to any payable after that date. That which became due on April 1st, 1896, passed to the grantee. The rent which was not due when the conveyance was made was part of the realty, and passed with it. It was an incident of the reversion, and the sale and transfer of title carried it over to the purchaser. Bank v. Wise, 3 Watts 405; Menough's Appeal, 5 W. & S. 432; Evans v. Hamrick, 61 Pa. 19. The plaintiff is, therefore, entitled to recover the rent payable April 1, 1895, but is not entitled to recover that payable April 1, 1896.

Judgment will, therefore, be entered in favor of the plaintiff, and against the defendant for $300, with interest from April 1, 1895.

EVANS vs. SHIFFER.

Judgment lien.

OPINION OF THE COURT.

By the will of William Shiffer real estate alone is disposed of. While the testator vested a discretionary power in his executor as to the sale of real estate for seven years after his decease, it then became imperative upon him to dispose of it.

It is clear that his intention was that it was to be converted into money, and that, as such, it was to be distributed to his son and nephew. McClure's Appeal, 72 Pa. 414; Richard's Appeal, 100 Pa. 51; Mellon v. Reed, 123 Pa. 1.

The judgments obtained by Evans and Coles against Charles Shiffer did not become liens on the land of which the testator died seized. Allison v. Wilson, Ex. 13 S. & R. 330; Trickett on Liens, Vol. 1, 221, Vol. 3, 262.

The land of William Shiffer having by the will been converted into personalty, the share of Charles Shiffer was subject to attachment in the hands of the executor. Fenton v. Fisher, 106 Pa. 418.

Coles is, therefore, entitled to the amount of his judgment from the proceeds of the sale of lands which came into the hands of the executor, while Evans has no lien on the fund, and is not entitled to any portion of the same.

By the court.

ELNORA GREEN vs. S. J. COOPER.

Interpretation of deed—Uncertainty of grantees.

STATEMENT OF THE CASE.

This is an action in ejectment in which the plaintiff seeks to recover an equal undivided one-fourth interest in the property described in the following deed, viz.:

This indenture, made the 1st day of November, in the year of our Lord one thousand eight hundred and fifty-nine, between John A. Talbot, of the township of Smiley, county of Carlisle, and State of Pennsylvania, of the first part, and Pamelia Talbot and Stephen A. Talbot's heirs, of the town, county and State aforesaid, of the second part. * * *

Witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred dollars to me in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said party of the second part, her and Stephen A. Talbot's heirs and assigns, all that certain piece or parcel of land, situate in the town, county and State aforesaid, described as follows:

Beginning at a poplar tree below Truman Talbot's house, thence northeast forty-eight perches to a post and stones; thence northwesterly forty perches to a post and stones, the corner of Cynthia Bell's lot; thence southwesterly forty-eight perches to a post by the highway; thence southeasterly to and with the highway forty perches to the poplar tree, the place of beginning; twelve acres, more or less. * * * * * *

Together with all and singular the hereditaments and appurtenances thereto belonging, and the remainders and rents, issues and profits thereof. * * *

To have and to hold the premises, his heirs and assigns, to the use of the said party of the second part, his heirs and assigns, forever. * * * *

And the said John A. Talbot to the said Pamelia and Stephen A. Talbot, his heirs, the premises hereby granted, with the appurtenances, against all and every person

or persons lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend the same.
* * * * *

In witness hereof the said parties have hereunto interchangeably set our hands and seals the day and year first above written.

JOHN A. TALBOT [SEAL].
GARTRY TALBOT [SEAL].

Signed, sealed and delivered in presence of us.

JOHN WALLACE.
ROBERT FRANKLIN.

Received the day of the date of the above written indenture of the above named heirs the full consideration money above med. JOHN A. TALBOT.

Duly acknowledged and recorded.

At the time of the execution and delivery of the above deed Stephen A. Tal bot and Pamelia Talbot were husband and wife, living together as such, and had four children, viz.: Elnora (plaintiff), Angeline, Mary and Anna. They, Stephen A. and Pamelia, went into possession of the property, and lived upon it until the death of Stephen A. Talbot, who died intestate in 1892. In 1895 Pamelia Talbot conveyed to her daughter, Anna, all her right, title and interest in said property, and in 1896 Anna conveyed it to Cooper, defendant.

The four daughters are all still living.

GERY and HESS for the plaintiff.

1. If original deed is void for want of certainty, then land belongs to Stephen Talbot in fee by virtue of adverse possession. Porter's Appeal, 45 Pa. 207; Creswell's Appeal, 41 Pa. 288; Morris v. Stephens, 46 Pa. 200.

2. This will not serve as color of title to give land to Pamelia Talbot by survivorship of a tenancy in entirety, because ambiquity be one potent upon its face. Pittsburg R. R. Co. v. Renish 100 Ill. 157; Hockins v. Kline, 4 Litt Ky. 318.

BASEHORE and FRANTZ for defendant.

1. The meaning giving validity will be chosen if two meanings may be taken from an instrument. Foster v. Rockwell, 104 Mass. 167; Brown v. Nuttocks, 103 Pa. 21.

2. A grantee is presumed to use a legal term in a legal sense. Porter's Appeal, 45 Pa. 207; Guthrie's Appeal, 37 Pa. 13.

3. A tenancy in entirety arises whenever an estate vests in two persons, they being when it so vests, husband and wife. Bramberry's Estate, 156 Pa. 632; McCurdy v. Canning, 64 Pa. 39.

OPINION OF THE COURT.

The legal effect of the deed from John A. Talbot was to convey a fee in the land to Pamelia Talbot. The conveyance is to "Pamelia Talbot and Stephen A. Talbot's heirs."

He "granted, bargained, sold and released and confirmed" the farm "unto the party of the second part, *her* and Stephen A. Talbot's *heirs*." Apt words to vest a fee in Pamelia Talbot are used by the grantor. Gray v. Parker, 4 W. & S. 17.

The grant to Stephen A. Talbot's heirs was void for uncertainty, and they took no interest in the land. Conclusive authority for the support of this position is the case of Morris v. Stephens, 46 Pa. 200.

There is nothing in the deed to "individuate the grantee," as was the case in Huss v. Stephens, 51 Pa. 282, and the word "heirs" must be accepted in its technical meaning. In no part of the deed has the grantor designated or used a term of phrase to indicate what particular heirs, if any, were intended. "Stephen A. Talbot's heirs" are, therefore, uncertain persons, and in effect, no grant whatever was made to them.

Stephen A. Talbot and his wife, therefore, went into possession of the property as that of the latter, Pamelia Talbot. The conveyance by her after the decease of her husband to her daughter, Anna, vested a fee in the latter, of which Cooper became seized by the deed made to him in 1896 by said Anna Talbot. Cooper is entitled to recover the land described in the writ, and judgment will be so entered.

JOHN KING vs. ADAM McKEE.

Assumpsit—Mistake—Evidence.

STATEMENT OF THE CASE.

A tract of land was conveyed to McKee on Nov. 13, 1889. Previously the grantee had conveyed away all the coal in it to Thompson. There were two veins of coal, one about forty feet above the other, the upper surface of the upper one being about twenty feet below the surface. Both veins were, on the average, seven feet thick. Thompson, who owned adjoining land, operated the upper one from that tract. Oct. 17, 1892, McKee agreed to convey the land to King, and a deed describing it by metes and bounds was delivered. It contained no exception of the coal. In this deed was a covenant of general warranty.

The price for the land was $175 per acre. The coal in the upper vein was worth (estimated by witnesses) $75 per acre, and in the lower, as much. The surface without the coal would be worth $160 to $200, according to seven witnesses examined. King subsequently attempted to take coal from the upper vein, when an action of trespass was brought by Thompson, and he desisted. At a certain point on the farm he was taking coal from the lower vein, and no action was brought for this. King discovering that Thompson owned the coal, brought assumpsit on the covenant. Three witnesses for McKee swore that it was understood at the purchase that McKee had not the coal, and the scrivener said he had been told to except the coal in the deed, but had forgotten to do so.

WALLACE and RYAN for the plaintiff.

1. To change or alter a written instrument, the proof must be clear, precise and indubitable. Quik v. VanAucken, 3 Pa. 69; Murray v. R. R. Co., 103 Pa. 37.

2. Deed to property, grantor having no interest, will not be reformed. Am. & Eng. Encyc. of Law, Mistake, Vol. 15, p. 561.

3. Fraud, accident or mistake has not been averred, hence evidence cannot be admitted. Grubb's Appeal, 90 Pa. 228; Wodock v. Robinson, 148 Pa. 503.

4. Mistake must be mutual, and negligence may not be shown by grantor. Brunseizer v. Davis, 134 Pa. 11; Wallace v. Haas, 63 Pa. 24.

VALENTINE and LAUER for the defendant.

1. Parol evidence is admissible to prove that through the fraud or mistake of the scrivener a clause was inserted in an instrument contrary to intention of parties. Hamilton v. Asslin, 14 S. & R. 448; Gower v. Sterner, 2 Whar. 74 (cases there cited); Christ v. Diffenbok, 1 S. & R. 464; Chew v. Gillespie, 56 Pa. 309. See also on question of parol evidence, Ins. Co. v. Webster, 59 Pa. 227; Hoffman v. R. R., 151 Pa. 174; Osborne v. Walley, 8 Sup. Ct. 193-97; Rearick v. Rearick, 15 Pa. 66; Morrison v. Morrison, 6 W. & S. 516; Turner's Appeal, 59 Pa. 398.

2. The testimony being clear, precise and indubitable, sufficiently established the oral understanding to warrant the submission of the question to the jury. Ferguson v. Rafferty, 128 Pa. 337; Axle Co. v. Leyda, 188 Pa. 322; Thomas v. Loose, 114 Pa. 35; Smith v. Henry, 4 Sup. Ct. 377; Spencer v. Colt., 89 Pa. 314; Pyrolum v. Hider Co., 169 Pa. 440; Gould v. Lee, 55 Pa. 108.

OPINION OF THE COURT.

This action is assumpsit on the covenant of general warranty contained in the deed from defendant to plaintiff. The plaintiff having proved that the defendant did not own the coal in the land conveyed at the time of the conveyance, the defendant asserts that he did not intend to convey the coal to plaintiff; that it was mutually understood at the time of the sale that the coal was to be excepted from the deed, and that a clause to that effect was omitted from the deed by a mistake of the scrivener. In support of his assertion the defendant offers the testimony set out in the statement of the case, and the court is now called upon to determine whether or not such testimony should be permitted to go to the jury.

The rule is firmly established that parol evidence is admissible for the purpose of proving mutual mistake in the terms of a written instrument, and the cases are numerous in which the rule has been invoked to correct the error of a scrivener. Hamilton v. Asslin, 14 S. & R. 448; Chew v. Gillespie, 56 Pa. 309; Gower v. Sterner, 2 Whart. 74. The plaintiff does not deny the existence or applicability of this rule, but contends that unless the evidence of mutual mistake adduced by the defendant be found by the court to be clear, precise and indubitable, the court should refuse to submit it to the jury. If such were really the law, there would never be an occasion to submit the question to the jury, for in case the evidence of mutual mistake *be* found by the court to be clear, precise and indubitable, it would be the duty of the court to direct a verdict for the defendant. The true rule, it is apprehended, is, that if the evidence of mutual mistake be such that the jury would be justified in regarding it as clear, precise and indubitable, it should be submitted to their consideration; but always with the instruction that unless the evidence *seems to them* to be clear, precise and indubitable, they must refuse to reform the instrument. In other words, if the evidence be such that reasonable men might differ as to whether or not it is clear, precise and indubitable, the question is within the domain of the jury. Spencer v. Colt, 89 Pa. 314; Young v. Edwards, 72 Pa. 257; Cullmans v. Lind-

say, 114 Pa. 166; Stafford v. Giles, 135 Pa. 411; Axle Co. v. Leyda, 188 Pa. 322; Thomas v. Loose, 114 Pa. 35.

It is not the duty of the court, then, to determine whether the evidence in the case at bar is clear, precise and indubitable, but whether it is of such a character that the jury might be justified in so finding. That it is, cannot seriously be doubted. Three witnesses swear positively that it was understood at the purchase that defendant did not own the coal; the scrivener swears that he had been told to except the coal, but had forgotten to do so; and in addition to this testimony, it appears that whereas the price paid by plaintiff to defendant for the land was $175 per acre, the coal alone was worth $150 per acre, and the land without the coal $160 to $200 per acre. This evidence of value has in itself but little bearing upon the question of mutual mistake, and it might be urged that it is not of a character proper for the jury to consider in the determination of that question. But in the case of Stafford v. Giles (*supra*), which, like the case at bar, arose from the sale of coal lands, testimony as to value was pointed out in the charge to the jury as evidence of mutual mistake, and the charge was upheld upon appeal.

The evidence will be submitted to the jury with the instructions indicated by the foregoing opinion.

HARRY RHOADS vs. WILLIAM TEMPLETON, ET AL.

Assumpsit—Indemnity—Guarantee.

STATEMENT OF THE CASE.

John Holmes, owning a lot, was having erected on it a building. No mechanics' liens had been filed, but they might still be filed, when Holmes borrowed $3,000 from Rhoads, giving a mortgage upon the lot as security. Two months later, three liens, amounting to $2,400, were filed against the lot, which, improved, was hardly worth more than $4,000. Rhoads complained of the impairment of his security, and insisted on some additional security. Holmes then got his friend Templeton to unite with him as surety on a paper reading thus:

CARLISLE, PA., June 19th, 1897.

We hereby indemnify Harry Rhoads against any loss he may sustain as mortgagee, on account of mechanics' liens that have been, or may be hereafter entered against the mortgaged premises.

Witness our hand.

JOHN HOLMES. { }
WM. TEMPLETON. { }

Subsequently a lien for $250 was entered. This is assumpsit on the indemnity.

ALEXANDER and MOON for the plaintiff.

1. There is a well settled difference between an agreement to pay a certain sum and an agreement to indemnify. In first case actual damage must be shown. In the latter recovery may be had as soon as liability occurs. Fisher v. Hoppock, 73 W. S. 99; Howe v. Hill, 29 Mo. 275.

2. Seal imports consideration as of course. Schwartz v. Shreur, 62 Pa. 457; Hosler v. Hursch, 181 Pa. 422.

BOLTE and DETRICK for defendant.

1. Whether an instrument is under seal or not is a question for the court, but whether at time or not of delivery is for jury. Duncan v. Duncan, Watts 322; Hocker's Appeal, 121 Pa. 192; Miller v. Bender, 28 Pa. 489; Long v. Ramsey, 1 S. & R. 71.

2. A promise to stand liable for debts of another is of no force unless founded upon consideration. Hess' Estate, 150 Pa. 346; Romberger v. Golden, 99 Pa. 34.

OPINION OF THE COURT.

When the $3,000 was loaned by Rhodes to Holmes, and the mortgage taken to secure the payment of the same on the house of the latter, it was in the course of erection. Liabilities had been incurred which might be entered as mechanics' liens against the property. After some such liens had been entered, the defendant joined the owner of the premises in a writing, guaranteeing the plaintiff, the mortgagee, against loss by reason of the entry of the same, or of any that might be thereafter entered.

No money was parted with by the plaintiff, or credit given to Holmes on account of the said guaranty. The plaintiff hazarded nothing on the faith of it, his risk had already been taken. He had loaned his money and taken as security a mortgage upon the house and lot, which were liable to be charged with liens for the labor and materials furnished for the construction of the said house.

But it is urged on part of the plaintiff that the instrument is under seal, and that a consideration is imported, even if there

was no consideration in fact to support it. Is the instrument under seal? This is a question of law, and must be determined by the court. Duncan v. Duncan, 1 Watts 324; Appeal of William Hacker, 121 Pa. 192.

The paper by its terms does not purport to be under seal. It is first signed by John Holmes, and then by the defendant. Above the name of the former there is a scroll, but there is nothing to show that this was ever adopted by Templeton as his seal. No intrinsic evidence appears on the face of the obligation, as was the case in Bowman v. Robb, 6 Pa. 302. We cannot hold that Templeton sealed the guaranty.

In Taylor v. Glaser, 2 S. & R. 302, the writing concluded with the words, "In testimony whereof we have hereunto set our hands and seals," and on which there were two subscribing witnesses under the words "sealed and delivered in presence of." Yet the court held that a flourish under the name of the obligor could not be treated as a seal.

And in Austin's Admx. v. Whitlock's Exrs., reported in 1 Mumford 487, it was decided that a written instrument which concluded with the words, "Witness my hand," was not a specialty, although there was a written scroll annexed to the signature.

We are, therefore, of the opinion that under the law, as settled by the courts there can be no recovery by the plaintiff as the guaranty was without consideration.

PENNSYLVANIA COLLEGE vs. HENRY ADAMS.

Ejectment—Sheriff's sale—Notice.

STATEMENT OF THE CASE.

The Pennsylvania College at Gettysburg has a campus of sixty acres. The Chapter of a Greek letter fraternity, desiring to erect a Chapter house, obtained leave to put it on the campus from the College Trustees. The agreement was made between them and five persons acting as representatives and trustees of the Chapter (which is unincorporated), that the latter might erect the house, the College having general supervision of it. No mechanic's or other liens to be put upon it, and the College to have the right at any time to buy the building at cost. The house was erected, and a certain material man, not having been paid, a lien was filed against it. In order to pay the material man, the Chapter trustees desired to borrow $1,800, and the College agreed that they might borrow that sum, on the security of the building. Thereupon the Chapter trustees borrowed $1,800 from Henry Adams, giving him a judgment note. On the judgment entered thereon an execution was issued, and the interest of the Chapter trustees in the building and curtilage levied on and sold by the sheriff to Adams. Adams took possession and turned the house into a residence for a tenant. Thereupon the College tendered the cost of the building, $2,500, to Adams, and insisted that he should surrender the possession. Adams refusing, this ejectment was brought.

MEARKLE and COBLENTZ for the plaintiff.

1. Adams, the purchaser at sheriff's sale, acquired only what *interest* the fraternity had. Smith v. Painter, 5 S. & R. 223; Water Power Co. v. Wilson, 83 Pa. 83; Sill v. Swackhammer, 103 Pa. 7; Aderhold *et al.* v. Oil Well Supply Co., 158 Pa. 401; Miller v. Baker, 166 Pa. 414.

2. Ejectment is the proper action to determine the possession and title to real property. Wills v. Fox, 1 Dallas 308; Bergman v. Roberts, 61 Pa. 497; Tilghman v. Marsh, 67 Pa. 507; Reeser v. Johnson, 76 Pa. 313; Long's Appeal, 92 Pa. 171; Mohan v. Butler, 112 Pa. 590.

DOUGHERTY and STAUFFER for the defendant.

1. A purchaser at judicial sale, without notice at time of sale of prior encumbrance, will be protected as *bona fide* purchaser. Stewart v. Freeman, 22 Pa. 120; Goepper v. Gartner, 35 Pa. 130; Jackson v. Post, 15 Wend. 588. A judicial creditor who purchases at sale under his own judgment comes under same rule. Mann's Appeal, 1 Pa. 24; Boynton v. Winslow, 37 Pa. 315.

2. Ejectment will not lie on a license or an incorporeal hereditament.

3. A defendant in ejectment is not affected by an equity without notice thereof. Rafferty's Estate, 9 Phila. 336; Hoff's Appeal, 84 Pa. 42.

OPINION OF THE COURT.

It is not necessary to discuss the nature or extent of the interest of the fraternity trustees under the agreement with the college. The sheriff did not pretend to sell an estate or a license or an easement,

but merely the "interest of the trustees," whatever that may have been. The only question, therefore, is whether the defendant, by his purchase at the sheriff's sale, secured the property free from the conditions contained in the agreement between the college and the fraternity trustees. It is well established that the doctrine of *caveat emptor* applies to sheriff's sales. Smith v. Painter, 5 S. & R. 223; Friedly v. Scheetz, 9 S. & R. 156; Moffat v. Israel, 4 Yeates 489; Weidler v. Farmers' Bank, 11 S. & R. 134; Banks v. Ammon, 27 Pa. 172; Aderhold v. Oil Well Supply Co., 158 Pa. 401. This does not mean that the purchaser takes subject to all defects. "He is not bound to see what is not to be seen. He is protected by the recording acts and secret defects in a title apparently good are for him no defects at all." Thus, if in the case at bar the record had shown a conveyance to the fraternity trustees, the defendant would have taken the property subject to the conditions therein contained, and free from all other conditions of which he had no notice. But there was no such conveyance. The purchaser, failing to find upon the record any conveyance whatever to the fraternity trustees, was certainly placed upon inquiry as to the nature and extent of their interest and the conditions upon which they held the property. If he had made inquiry he would have found that one of the conditions was that the premises should be surrendered to the college at any time, upon payment or tender of the cost of the building erected thereon. Having failed to make inquiry, he purchased subject to all rights which inquiry would have disclosed. As was said by Mr. Justice Williams, in Aderhold v. Oil Well Supply Co., 158 Pa. 401, where the appellant was the purchaser of an oil lease at sheriff's sale: "As such purchaser he could acquire no greater interest or estate than that actually held by the lessee, and he would take subject to all the covenants and conditions in the lease. He was bound, therefore, to inquire. Failing to do so, he is fixed with notice of all that inquiry would have disclosed." The defendant, then, being chargeable with notice of the extent and nature of the interest of the fraternity trustees, and of the rights of the college under the agreement, can claim no greater interest than the fraternity trustees, and the college, having made valid tender of the cost of the building, is entitled to possession of the premises.

Ejectment is unquestionably the proper remedy. If defendant merely claimed a privilege or easement, ejectment might not be suitable—Clement v. Youngman, 40 Pa. 341; Carnahan v. Brown, 60 Pa. 23; but we understand him to raise the question of title, to determine which ejectment is the approved form of action.

Judgment for plaintiff.

BLAKE'S ESTATE.

Alterations in written instrument—Burden of proof.

STATEMENT OF THE CASE.

Before an auditor making distribution of Blake's estate, William Hood presented a check, reading thus:

CARLISLE, October 7, 1898.

CARLISLE DEPOSIT BANK,

Pay to Amos Friend, or bearer, the sum of twelve hundred and seventy-three dollars.

$1273.00. JOHN BLAKE.

On the back of the check was Friend's endorsement. The word *twelve* was written over a scraped place, except the letters *t* and *w*. The ink used in writing *twelve* was the same in color and appearance as that used on the rest, and the same pen seemed to have been used. The letters *e l v e* were more crowded together than the letters *t* and *w* in *twelve*, and than the letters in the other words. The figure 1 seemed to be in the same ink and with the same pen as the other figures *273.00*.

Other creditors objected to the reception of the check in evidence until explanation was tendered of its present appearance. The signature was not disputed, nor any other part of the check, which (except signature) had been written by Friend.

RUSSELL and BARR for the plaintiff.

1. The check should have been admitted, for the defendants, alleging it to be altered, have proved no alteration. Simpson v. Davis, 119 Mass. 269; Farmers' L. & T. Co. v. Liefke, 44 N. Y. 354; Willet v. Shepherd, 34 Mich. 106.

SHAFFER and SAULSBURY for the defendant.

1. A person offering an altered check must explain its alteration before it will be

received in evidence. Nagle's Estate, 134 Pa. 34; Nesbitt v. Turner, 155 Pa. 429; Hartley & Co. v. Carboy, 150 Pa. 23.

OPINION OF THE COURT.

Amos Friend supports his claim against Blake's estate by producing a check for $1273. That the name John Blake was actually written by Blake is not disputed, nor that the rest of the check was written by Friend, the payee. When A subscribes a note, check, bond, etc., written by B, he adopts such note, check or bond according to its import, making it his own.

The question before us is, was the check, as it is now, the check to which Blake affixed his name? There is no evidence upon the point, other than that furnished by the check itself. It is clear that the check does not present very convincing evidence that it was in another form when Blake executed it. Of the word twelve, the letters e l v e are written over a scraped place. Why was the scraping? Was it on the paper before the check was written? Was there an accidental blot, which it was designed to remove? Had some other letters than those intended been first written, and were they deleted in order that the proper ones should be written? Or, were the letters originally written, written with intention, and did the parties afterwards change their intention as to the amount, and, in execution of the changed intention, scrape off what had been written and write the letters now appearing? All these suppositions would consist with the identity of the present check with the check to which Blake subscribed his name. It is clear, then, that the hypothesis that the scraping took place after Blake's execution of the check is only one of at least five that would account for the present appearance of the word "twelve."

Nor is any aid given to the fifth hypothesis by the color of the ink, or the general nature of the characters. The letters e l v e seem to be in the same ink, by the same pen and by the same hand as the rest of the check. The letters e l v e are, however, more crowded together, but this circumstance simply suggests that some shorter word has been erased, and in its place twelve inserted. Were this so, it would be inconsistent with the first two hypotheses, but equally consistent with any of the other three.

The Arabic numerals on the left hand of the check are equivalent to the words, and there is nothing in them suggestive that any of them has been changed or inserted since the completion of the instrument.

The check cannot be said, then, to satisfactorily show that it was altered after execution by Blake. But, does it raise a reasonable suspicion that it was so altered? We think it does. The erasure is where a critically important part of the check, its amount, appears. Illegitimate changes in the amounts are more frequently made than in other portions of such instruments. The letters t w may have been parts of the word two. The space occupied by e l v e is no larger than the letter *o* and the space between it and the word hundred may have occupied. That space enough was left between the dollar mark and the figures 273 to admit the insertion of the figure 1 is quite supposable. A substantial suspicion, we think, that twelve has been substituted for two, is justifiable.

But, are any consequences to flow from this suspiciousness? We think that when the face of a document is thus suspicious, he who pretends to use it to establish a right, must allay the suspicion. The burden is upon him to explain those features which have awakened it. Simpson v. Stackhouse, 9 Pa. 186; Gettysburg Nat. Bank v. Chisholm, 169 Pa. 564; Hartley v. Carboy, 150 Pa. 23; Citizens' Nat. Bank v. Williams, 174 Pa. 66; Nesbit v. Turner, 155 Pa. 429; Nagle's Estate, 134 Pa. 31. The maker of the check is dead, and it would be improper to cast on his administrator or next of kin the burden of showing that the check has been changed since it left Blake's hands. The features of the check that arouse our suspicion should have suggested to Friend that they would need explanation; and he was negligent in accepting the check in its present form, if it was in fact in that form when he took it.

The auditor was right in refusing to receive the check without explanation, and Friend's exception to his report is dismissed.

PHILLIPS' ESTATE.

Legacies charged upon land--Set-off.

STATEMENT OF THE CASE.

Adam Phillips, dying October 3, 1897, devised a farm to his grandson (son of a deceased son) Jacob, and provided that "he pay to my heirs the sum of $2,700." The testator left to survive him, besides Jacob, a son, Charles; a daughter, Sarah Roberts, and a grandson, John; son of another (deceased) daughter, Rebecca Williams. Rebecca Williams had borrowed and not repaid $900 from her father on August 12th, 1890. Sarah Roberts was also indebted to him for a house sold to her in the sum of $1,750, since 1894. On October 17th, 1893, Sarah Roberts died, leaving to survive her a son Amos. This is a petition to the Orphans' Court by Charles, John Williams and Amos Roberts, for a decree that Jacob Phillips pay each $900; or, in default, that the land devised to him be sold.

The petition alleging the above facts—demurrer by Jacob Phillips.

RALSTON and ROTHERMEL for the plaintiff.

1. The devisee cannot make set-offs for. (*a*) The debts he seeks to set-off are payable to the administration only. Milliken v. Grader, 37 Pa. 456; Gerber v. Meredith, 160 Pa. 102. (*b*) There is no mutual right to sue between the parties. Lee v. Perry, 6 Kulp 339; Trunick v. Gierick, 81 Pa. 160.

EDWARDS and BORYER for the defendant.

OPINION OF THE COURT.

Adam Phillips devised a farm to his grandson, John Phillips, provided he paid to the heirs of him, the said Adam, the sum of $2,700.

This became a charge on the land in the hands of the devisee. Pryer v. Mark, 126 Pa. 529. The heirs of the testator, besides this devisee, were a son Charles, and two other grandsons, the children of the deceased daughters, both of whom were indebted to their said father. These heirs under the provisions of the 59th section of the Act of 24th of February, 1834, applied to the Orphans' Court for an order and decree directing that the legacies so charged on the land should be paid to them by the devisee thereof. That such payment can be enforced only by the legatees has been settled by numerous adjudications. Field's Appeal, 36 Pa. 11; Littleton's Appeal, 93 Pa. 181; Hartzell's Estate, 178 Pa. 289. An executor cannot enforce the payment of legacies charged on land. The payment, however, is resisted by the respondent, because of the indebtedness of the two mothers of the petitioning grandsons to the estate of their father, Adam Phillips. He insists that he should be allowed to set-off the proportion of this indebtedness to which he would be entitled to as one of the heirs or distributees of the same against the legacies payable to the petitioners. But the indebtedness is not in the same right, nor is there such mutuality as will enable the devisee to set-off indebtedness due by the legatees to the estate of the devisor, nor any proportion of the same. Gerber v. Meredith, 160 Pa. 102.

It will be the duty of the executor to collect the assets of the estate, and have a distribution made of the same. In no other way can John Phillips, the respondent, be placed in a position to enforce payment of the claim he now seeks to set-off against the legacies charged on his land.

The petitioners are, therefore, entitled to have the decree made which has been prayed for.

HARTMAN vs. BOROUGH OF MIDDLETOWN.

License—Permits from borough authorities.

STATEMENT OF THE CASE.

M. H. Hartman is the owner of a house and lot of ground situated at the corner of Lawrence street and Witherspoon avenue, in Middletown, and as such, applied to the Middletown Drainage Company for sewage facilities, but was refused them at their regular schedule of rates; whereupon, he requested the burgess and town council, of the borough of Middletown, to devise some means by which he would have proper drainage for his property. The said borough of Middletown, on the 14th day of October, A. D. 1895, passed a resolution authorizing Hartman to enter upon and lay a drain beneath the surface of a portion of Witherspoon avenue, for the

purpose of carrying off surface water from his premises. Hartman thereupon, at great trouble, inconvenience and expense, laid terra-cotta pipe through his lot and over a portion of Witherspoon avenue, which pipe was allowed to remain unmolested for a period of over two years. Some time in the latter part of January, A. D. 1898, the defendant, without first having obtained permission from plaintiff, tore up the terra-cotta pipe on said portion of Witherspoon avenue, and plugged the remaining portion of said pipe at a point along the line of Hartman's lot, adjacent to the cellar wall of the property of Adam Baumbach. This caused the surface water to accumulate in the portion of the terra-cotta pipe remaining on his lot, and flow back into his hydrant, flooding the same, as well as the portion of the lot adjoining the kitchen of his property.

The water which accumulated in the pipe remaining on Hartman's lot was caused to flow into the cellar of the property owned by Adam Baumbach, causing damage to it, which damage the plaintiff was compelled to pay, and in order to remove the cause of damage to the property of the said Adam Baumbach, he, at great trouble and expense, removed the terra-cotta pipe from his lot. This necessitated the changing of spouts on his property and the water course at hydrants, which the said plaintiff did at considerable trouble and expense.

Wherefore plaintiff says he has sustained damage in the sum of four hundred ($400) dollars, and, thereupon, he brings suit.

MEYER and STEWART for the plaintiff.

1. The right is in the nature of an easement. Dark v Johnston, 55 Pa. 164; De Hare v. U. S., 5 Wall 599.

2. The borough is liable for a negligent disregard of the right granted. Child v. Boston, 4 Allen 41; Barton v. Syracuse. 37 Barb. 292; Campbell v. McCoy, 31 Pa. 236; Thompson v. McElarney, 82 Pa. 175.

AUBREY and HEIST for the defendant.

1. The right is a mere license. Tiedeman on Real Prop., Sect. 1, 623; Morse v. Copeland, 2 Gray 302.

2. This right the borough may at any time revoke. Johnson v. Crow, 87 Pa. 187; Bransdon v. City of Philadelphia, 47 Pa. 329; Monongahela Nav. Co. v. Coons, 6 W. & S. 101.

OPINION OF THE COURT.

The solution of the question presented by this case depends on the power of the borough to make a contract or license, for the laying of a drain in a street, which should preclude the recall of the right to maintain it.

Within certain limits, a borough may so far authorize a private drain, that the excavation in the street for the purpose of laying it shall not be a public nuisance, of which the licensee may be deemed guilty, as respects third persons. Smith v. Simmons, 103 Pa. 32; Wood v. McGrath, 150 Pa. 451, or on account of the abuse of which the borough will be liable. Borough of Susquehanna Depot v. Simmins, 112 Pa. 384.

Our attention has been called to no case, however, in which it has been held that the borough itself is so far bound by the license to or contract with an individual for the erection by the latter of a private sewer, that it cannot revoke such license or put an end to such contract, whenever, in its opinion, a sound municipal policy so requires. In Hutchinson v. Board of Health, of Trenton, 39 N. J. Eq. 569, the power of the city to authorize the construction of a private drain in the public streets, was denied, and such a use of the drain as constituted a nuisance, was restrained as a nuisance. The Supreme Court of Rhode Island, in Eddy v. Granger, 28 L. R. A. 517, declared that a town could not give a vested right to maintain a private drain in a highway such that a subsequent cutting off of the drain by an extension of the system of sewers, would create any liability against the town. A different view was held by certain members of the Michigan Supreme Court, in Stevens v. City of Muskegan, 36 L. R. A. 777, but even there it was held that an action at law for damages for the prevention by ordinance of the use of a private sewer in a public street, would not lie, although the ordinance interfered with the vested contract rights of the plaintiff.

The reason for the act of the council of Middletown does not appear. The council has general control of the streets, the sewers, etc. The right of Hartman to originally build the drain, is predicated by

him upon its concession. We do not think that council may alienate their control over the streets and the sewerage system of the borough so far as to preclude their retraction of the right to maintain the drain. If this be true, Hartman knew when he built the drain, that his right was precarious, and at the will of the licensor. He cannot complain, however indignant and disappointed he now feels, at the deprivation, in view of whose possibility at any time, he built the drain.

We do not see how, in any event, the defendant is to be charged with the damage to Baumbach, which Hartman paid. When his drain was plugged up it was Hartman's duty to adopt means to prevent the flooding of Baumbach's cellar. He was not excused from this, because of the act, even if tortious, of the borough which made it necessary. Indeed, his paying Baumbach, if voluntary, is an admission of this duty. If it was compelled by the judgment of a court, that judgment must have assumed the existence of such a duty.

The legitimate cost of the change of the water-spouts, and of "the water-course at the hydrants," could doubtless be recovered, were there any right of action at all. This we have been constrained to negative.

Plaintiff non-suited.

SAUNDERS vs. GOULD.

Liability of commercial agency for negligence.

STATEMENT OF THE CASE.

Gould having for years collected information about the financial standing of persons in business in the Cumberland Valley, at length published that he would furnish a printed list of such persons, with their standing, to subscribers paying twenty-five dollars ($25) per year.

Saunders, a Philadelphia merchant, received an order from a Carlisle merchant, Adams, subscribed for the list, paying the twenty-five dollars ($25), and finding that Adams was rated, as having assets equal to fifteen thousand dollars ($15,000), and debts equal to five thousand dollars $5,000), sold him five hundred dollars' ($500) worth of goods. The copy furnished by Gould to the printer had said Adams was worth fifteen hundred dollars ($1,500) and owed a debt of five hundred dollars ($500). Adams, in fact, when the list was printed, had thirty-five hundred dollars ($3,500) of assets, and was indebted to forty-seven hundred dollars ($4,700), a judgment against him for three thousand dollars ($3,000) being in the court of Common Pleas. Saunders' sale took place five (5) weeks after the publication of the list, but no material change in Adams' situation had since taken place. Shortly after the sale, that is, three (3) days, another creditor entered a judgment for fifteen hundred dollars ($1,500), issued execution and levied on all his property, which was subsequently sold.

Saunders, unable to obtain payment of any part of the five hundred dollars ($500), sues Gould in trespass.

TRUDE and HOLCOMB for the plaintiff.

1. The defendant's negligence was the cause of plaintiff's loss, and in the absence of stipulations against liability for negligence the plaintiff must recover. Carew v. Bradstreet, 134 Pa. 161; Sprague v. Dun, 12 Phila. 310; Duncan v. Dun, 7 W. N. C. 497.

ADAMSON and LENTZ for the defendant.

OPINION OF THE COURT.

In furnishing printed lists containing information as to the financial standing of business men in the Cumberland Valley the defendant unquestionably engaged that such lists had been prepared and printed with a reasonable degree of care and skill, and that a reasonable degree of diligence had been employed in collecting the information therein contained. Sprague v. Dun, 12 Phila. Rep. 310; Carew v. Bradstreet, 134 Pa. 161. Indeed, the rule is general that when a person offers his services to the public in any business, trade or profession, there is an implied engagement with those who employ him that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by persons in the same business, trade or profession, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business, trade or profession, and that he will per-

form matters intrusted to him diligently and faithfully. Hale on Torts, p. 474, and cases there cited.

It is undoubtedly true that the defendant might have expressly contracted against liability for negligence, although such contracts are not looked upon with favor by the law, and are therefore construed strictly, with every intendment against the party seeking their protection. Carew v. Bradstreet, 134 Pa. 161; Duncan v. Dun, 7 W. N. C. 246. In the record of the case, however, no such contract appears, and Gould's only defense is that he is not chargeable with failure to exercise due care under the circumstances. The copy furnished by him to the printer stated that Adams was worth $1,500 and owed a debt of $500, thus showing an excess of $1,000 in assets over and above liabilities. As a matter of fact, Adams' liabilities exceeded his assets by $1,200. This serious discrepancy is not explained, and in view of the fact that the major part of Adams' liabilities consisted of a judgment in the court of Common Pleas, it is difficult to resist the conclusion that Gould is chargeable with negligence in collecting his information. Moreover, in printing the lists another blunder was committed, which was even more serious than the first. By a typographical error, which the defendant failed to detect, Adams' assets were stated as $15,000 and his liabilities as $5,000, thus showing a balance of $10,000, instead of $1,000. In failing to discover and correct this mistake, the defendant is undoubtedly chargeable with negligence. In Carew v. Bradstreet (*supra*) the defendant's book represented a certain corporation as having $600,000 capital actually paid in, whereas in fact that was the amount of authorized capital, of which only $20,000 had been paid in. The error was shown to have been merely typographical, but the court said: "It was certainly neglect on the part of the company to issue a book containing such a gross error." The error in the case at bar is perhaps not so great as that in the case quoted, but we think it sufficiently grave, under the circumstances, to charge the defendant with negligence as matter of law.

Judgment for plaintiff affirmed.

HARRISON vs BLACK.

Conditional sale—Bailment.

STATEMENT OF THE CASE.

This indenture, made on the fourth day May, A. D. 1898, between Samuel Harrison, of the first part, and Morris G. Black, of the second part, Witnesseth, that Samuel Harrison doth let unto the party of the second part, a new hay wagon for the term of three months, from this day, and the sum of $135, for which a note of even date has been given, for which, in consideration of the delivery to me as bailee of said Samuel Harrison, agrees to pay a rental for the use and hire thereof, and in case of default of payment of above rent, Samuel Harrison is authorized to enter and remove said wagon, and collect said rent, and when said note is fully paid the said Samuel Harrison will deliver to the party of the second part a bill of sale for said wagon.

Witness my hand and seal.

MORRIS G. BLACK, [SEAL].

At the same time that the above agreement was entered into a judgment note for $135, absolute on its face, was given by the said Black to Harrison, payable in three months. The wagon was delivered to Black at the same time. On August 4th, 1898, Black paid $12 to Harrison. On September 16th, 1898, without any fault of either party, the wagon was destroyed by fire. Harrison took possession of the iron-work, with the consent of Black, and made an unsuccessful effort to collect the insurance for the wagon, representing that it was his property when destroyed. On December 22nd, 1899, Harrison entered judgment on his note. Upon rule to show cause, judgment was opened and an issue directed.

This action is to determine what amount, if anything, is due Harrison.

LIGHTNER and CLARK for the plaintiff.

1. The transaction was a conditional sale. Ott v. Swartman, 166 Pa. 217, and cases there cited; Edwards' Appeal, 105 Pa. 103.

2. Under this contract the vendor may either retake the property or sue for its price. Seanor v. McLaughlin, 165 Pa. 150.

3. The attempt to collect the insurance does not amount to a rescission of the con-

tract, for the vendor in a conditional sale of insured personalty has a right to recover the insurance. Reed v. Luckens, 44 Pa. 200; Parcell v. Grosser, 109 Pa. 620.

4. Loss of property without fault of the vendee does not relieve him from liability to pay for it. 6 Am. & Eng. Encyc., 2nd Ed., 455; Hannston v. Cherry, 23 Hun. 141.

JOHNSTON and LAVENS for defendant.

1. The title, under this contract, remaining in Harrison at the time of the loss, he cannot recover. Wells v. Alnan, 107 Mass. 514; Joyce v. Adams, 8 N. Y. 290; McMahon v. Rauhr, 47 N. Y. 65.

OPINION OF THE COURT.

The contract between Harrison and Black purports to be a loan of a hay wagon from the former to the latter. Harrison "lets" it for the "term of three months" and the sum of $135. Black, who signs and seals the contract, in consideration of the delivery to him, as "bailee," agrees to pay a "rental" for the "use and hire" of the wagon. In case of default of the payment of the "above rent" he authorizes Harrison to "remove said wagon and collect said rent." When "said note" is fully paid Harrison is to deliver a bill of sale of the wagon.

It is evident that the $135 is the "rental" intended, and that it is the sum which Harrison is authorized to collect. If the words of the parties are to be taken literally, the note is a security for the rent, which has been fully earned, and no defence has been suggested, which would prevent a recovery upon it. The defendant contends, however, and the plaintiff concedes, that the transaction, though termed a lease, or bailment, was, in fact, a contract to sell on the payment of the note, the possession intermediately passing to Black, with the reservation to Harrison of the "title" and of the right to resume possession, on Black's default. We are of the same opinion. Let us then see, on this assumption, what there is to prevent the plaintiff's recovery.

The sale was on a credit of three months. The $135 was the price of the hay wagon. It was not seriously intended to be compensation for a three month's use of the vehicle. This price was to be paid unconditionally, and the note in suit was given for it. The parties to this action are the parties to the contract. There are no execution creditors or purchasers of the wagon from Black, contesting the validity as to them of the transaction, nor is it easy to conceive how they could object to Harrison's compelling Black to pay the money according to his promise.

The first objection to a recovery, is that the wagon has been destroyed by fire. But why should the loss be Harrison's? He had parted with the possession of it. He had lost the right to recover the possession, except on Black's default. The "title," which he retained, was simply a means of compelling the payment of the price in order to avoid a rescission of the contract. Black had become at least as substantial an owner of the wagon as Harrison. He had the possession, the power to retain it forever, and the power to extinguish whatever *simulacrum* of ownership might remain in Harrison. His relation to the latter, with respect to the wagon, was in all important respects, similar to the relation of a vendee of land under articles to the vendor. If between the contract of sale and the conveyance a diminution of the value of the land occurs by means of a fire or other agency, the vendor does not lose the right to recover the price. The loss falls on the vendee, who is the equitable owner. Parcell v. Grosser, 109 Pa. 617; Reed v. Luckens, 44 Pa. 200; Demmy's Appeal, 43 Pa. 155. We see no reason for imposing the loss resulting from the burning of the wagon upon Harrison.

It is suggested by the defendant that Harrison demanded the insurance money after the fire, asserting that it was his property that was destroyed. He could not have claimed the money, except as owner. He had in the contract styled himself bailor. We have seen that he was not bailor. The defendant concedes that he was not bailor. The defendant repudiates the hypothesis on which the demand on the policy was made. As the demand was unsuccessful it cannot be alleged to estop Harrison from now proceeding on the assumption whose truth the defendant concedes. But, even if Harrison had obtained the insurance money, he would have held it as trustee for Black, who could defalk it from the note. Reed v. Lukens, 44 Pa. 200; Parcell v. Grosser,

109 Pa. 617. It was not only his right, but his duty towards Black to endeavor to collect the policy, and it would be strange if this endeavor to perform his duty towards Black should deprive him of his remedy upon the note.

Another objection alleged to the recovery is that after the fire Harrison took possession of the ironwork. In the absence of an express stipulation that the vendor may both resume possession of the chattel contracted to be sold, and sue for the price, he has the option to adopt either measure of redress, but not both. He can retake possession. Levan v. Wilton, 135 Pa. 64; North v. Williams, 120 Pa. 109; 6 Am. & Eng. Encyc., 479, 480; but if he does so, he cannot sue on the note or other security for the price. His resumption of possession is understood to be a rescission of the contract. Seanor v. McLaughlin, 165 Pa. 150; Campbell v. Hickock, 140 Pa. 290; Scott v. Hough, 151 Pa. 630. The defendant alleges that the taking possession of the "ironwork" was expressive of Harrison's purpose to rescind, and so precludes him from subsequently sueing for the price.

We do not think that the taking possession of the ironwork has this significance, for two reasons. The parties may bestow on each other as many remedies as they choose. The right to sue for the price may be one; the right to regain possession of the chattel, and retain it until the price is paid, may be another. The defendant expressly stipulated that "in case of default of payment of above rent, Samuel Harrison is authorized to enter and remove said wagon *and* collect said rent." The "rent" here mentioned is, as we have seen, $135, the price of the wagon. Harrison, therefore, had the right to retake the whole wagon as security for the money, and to sue for the money. The parties competent to do so, have so contracted. Their will is the law. And if Harrison could take the whole wagon, without losing the right to sue, he surely could take the remnants of the wagon.

But the taking of the ironwork was apparently not in the assertion of a right, for it was "with the consent of Black." The entire significance of the act depends on its having been done with reference to the right of rescission. If it was not an act of rescission it can not impair the right to sue for the price of the wagon. That it was not intended to be a rescission is probable from the folly of taking back the iron work of a wagon as a substitute for the remedy on the note for $135. Had he taken back the whole wagon, in substantially its original condition, it might readily have been supposed that he intended to divest the conditional interest in it of Black, and surrender his right to the price. Such intention cannot be imputed because of the taking possession of the comparatively worthless remains of the wagon.

We think it follows that the plaintiff should recover the $135, with interest from three months after its date, less $12, with interest from August 4th, 1898, and (further, if the jury is of opinion that the understanding was that the value of the ironwork should be deemed a partial payment on the debt) less the value of the ironwork, with interest from the time of the plaintiff's taking it.

JOHN BELL vs. AARON MOSIER.

Conditional sale—Payment by promissory note.

STATEMENT OF THE CASE.

Mosier, a jeweler, agreed that Bell should have a gold watch on paying $15 down and $5 monthly till its price, $100, should be paid; the watch to remain Mosier's till the whole was paid. After paying three monthly installments, Bell paid no more. Six months after ceasing to pay Bell stopped in Mosier's store to have a friendly talk, when the latter asking to look at the watch and see if it needed cleaning, obtained it from Bell; he refused to give it back unless Bell should give him a note for the unpaid balance, with surety. Bell obtained his father as surety, and Mosier accepted the note and gave back the watch. When the note fell due it was not paid. Two days thereafter Bell took the watch to Mosier to be repaired, and Mosier kept it. Nor did he hand back the note. Replevin for watch.

SHELLENBERGER and DAVIS for the plaintiff.

1. When buyer gives a note for the price it is *prima facie* absolute payment of the note. Plankinham v. Cave, 2 Yeates 370; Tacher v. Dinsmore, 5 Mass. 299; Dodge v. Emerson, 131 Mass. 468.

GRAUL and ROBITAILLE for the defendant.

1. A promissory note does not discharge a debt, but merely postpones such discharge. Segrist v. Crabtree, 131 U. S. 287.

2. After failure to pay the note the vendor's right to take the property was complete. Anson on Contracts, 273; Hayes v. McClurg, 4 Watts 452.

OPINION OF THE COURT.

The watch was not to become the property of Bell until the price, $100, was fully paid. Possession was, however, given to Bell. It must be understood that the right to the retention of it was conditioned upon Bell's making the payments according to his stipulation. Bell having paid $40, paid no more for six months, when stopping at Mosier's store to have a friendly talk, he let Mosier have the watch on his pretense that he would examine to see if it needed cleaning. Gaining the watch in this way, Mosier refused to give it back to Bell, unless Bell should give him a note, with surety, for the balance of purchase money. When the note was given the watch was restored to Mosier.

Mosier had a right to repossess himself of the watch, even by a trick or deceptive pretense, and to retain it either in rescission of the contract, or, at all events, as a means of coercing performance of it. What are we to regard the intention of the parties in giving and receiving the note? If such act was a payment, the watch became the unconditional property of Bell. Was it a payment?

When a debtor gives a note or check to a creditor for an existing debt, the note or check is to be regarded as payment only if and when it is paid, the right of suit on the original debt being meantime suspended. Holmes v. Briggs, 131 Pa. 233; League v. Waring, 85 Pa. 244; Shepherd v. Busch, 154 Pa. 149; Levan v. Wilber, 135 Pa. 61. Nothing in the evidence before us indicates a different purpose of the parties. When, then, the note was not paid, at maturity, all rights on the original contract revived, and among them was the right of Mosier to treat the watch as his own, and to regain the possession. Levan v. Wilber, 135 Pa. 61.

After the note had become due, the watch was taken by Bell to Mosier to be repaired. Mosier, thus peaceably getting it, refused to give it back. In so acting he did what he had a right to do. Whether he could rescind the contract, without repaying to Bell the $40 or not, he surely could retake the watch, and keep it until payment for it was completed.

The action of replevin presupposes a present right in the plaintiff to the possession. Possibly Bell could, by completing the payment, require the redelivery of the watch to him. Before doing so, however, he has no such right. The court, therefore, properly instructed the jury that the plaintiff could not recover.

New trial refused.

JONES vs. SIMPSON.

Renewal of judgment—Rights of judgment debtor's grantee—Notice of sci. fa. to terre-tenant—Unrecorded deed.

STATEMENT OF THE CASE.

Jones obtained a judgment against Josiah Hooper for $250 on Aug. 11, 1894, Hooper then owning for life a farm. Three months afterwards he acquired the remainder in fee. On January 19, 1899, Hooper conveyed the farm to Simpson, but the deed was not put on record. On Aug. 20, 1899, a *sci. fa.* to revive the judgment was issued against Hooper, naming nobody as terre-tenant, but the sheriff served the writ on Simpson, and returned service on him as terre-tenant. A judgment of revival was recovered against Hooper and Simpson, as terre tenant. The land was sold by the sheriff on this judgment, and bought by Jones, who brings this ejectment to recover the possession.

HENDERSON and JOSEPH RHODES for the plaintiff.

1. The *terre-tenant's* failure to record his deed prevents the lien from being lost. Wetmore v. Wetmore, 155 Pa. 507; Buck's Appeal, 100 Pa. 109.

2. The defendant cannot question the validity of the sale, for he was properly served with notice, and failed to except to the sale within the proper time. Hinds

v. Scott, 11 Pa. 19; Kichner v. Dengler, 1 Watts 424; Colborn v. Trinysey, 13 Pa. 38.

KATZ and ELMES for the defendant.

1. Five years having elapsed from the time of the judgment, its lien has ceased to exist as regards purchasers. 1 P. & L. Dig. 2471; 1 Trickett on Liens, 246; Rudy's Appeal, 9 W. N. C. 308; McCahan v. Elliott, 103 Pa. 634; Green's Appeal, 6 W. & S. 327.

OPINION OF THE COURT.

The principal contention of the defendant is that since the plaintiff failed to have a *scire facias* issued on the judgment against Hooper within five years from the date of its entry, the said judgment, at the expiration of that period, ceased to be a lien upon the land purchased by him. The precise question before us, therefore, is this: Will a failure to institute the statutory proceeding to revive a judgment within five years from the date of its entry result in the loss of the creditor's lien as against a terre-tenant who purchased before the expiration of the five years, but whose deed is not recorded, and who does not appear to have taken possession of the premises?

The question is not only an interesting and important one, but one which, we believe, has not been directly passed upon by the courts. Its decision, of course, must be controlled by the provisions of the Act of June 1, 1887; but in the interpretation of that law a brief review of the earlier legislation may be of some value. The original Act of April 4, 1798, was of a very general and indefinite nature, and was greatly abused in practice. Its efficiency was much increased, however, by the Act of March 26, 1827, and, as thereby supplemented, it enacted in effect that no judgment should continue to be a lien upon real estate during a longer period than five years, unless revived within that period by agreement of the parties and terre-tenants filed in writing, or a writ of *scire facias* to revive the same be issued within such period. In interpreting the provisions of this statute, it was expressly declared that in case the defendant convey land before the expiration of five years, the fact that the terre-tenant fails to record his deed does not excuse a failure to make him a party to the revival proceedings. Armstrong's Appeal, 5 W. & S. 352. *A fortiori*, such failure of the terre-tenant would not excuse a failure to take any steps whatever to revive the judgment.

The decision in Armstrong's Appeal worked an undoubted hardship to creditors, and as a result the Act of April 16, 1849, was enacted, providing that the period of five years during which the lien of the original judgment continues shall only commence to run in favor of the terre tenant from the time when he placed his deed on record. This act was construed in Porter v. Hitchcock, 98 Pa. 625, where the learned court says: "The Act of 1849 so far alters this rule that a revival of the judgment against the original debtors will bind the terre-tenant, unless he has put his deed on record, or is in the actual possession of the land, and his right to notice now commences only from the date of such record, or time of such possession. In other words, by complying with the terms of this act, he entitles himself to the notice prescribed by the Act of 1827, otherwise he is entitled to no such notice, and his land continues to be bound by the lien of the original judgment so long as it is kept revived against the original debtor." It will be noticed that even in the interpretation of this act—favorable as it is to the creditor—the necessity of instituting proceedings against the original debtor within five years, although his conveyance to the terre-tenant is unrecorded, is absolutely unquestioned.

Turning now to the Act of June 1, 1887, we find that it re-enacts the Act of 1827, including the provision that no judgment shall continue a lien upon the real estate of a terre-tenant "for a longer period than five years from the day on which such judgment may be entered or revived, unless revived within that period." This is so plainly inconsistent with the Act of 1849 that the Superior Court has felt compelled to decide that the Act of 1849 is thereby repealed. Uhler v. Moses, 10 Pa. Sup. Ct. 194. The hardship to creditors under the Act of 1827, which the Act of 1849 was designed to remove, however, is not re-imposed by the Act of 1887, for in the interpretation of the provisions of that act it has been held that failure to make party to the proceedings a terre-tenant, whose deed is unrecorded, and who is

not in possession, will not result in the oss of the lien as against such terre-tenant. Lyon v. Cleveland, 170 Pa. 611; Meinwiser v. Hains, 110 Pa. 468 In these cases, as in the cases arising under both of the earlier statutes, it appears to be conceded that the fact that the terre-tenant's conveyance is not on record, and even that he is unknown to the creditor, will not excuse a failure to institute the statutory proceedings. In the case of Lyon v. Cleveland (*supra*), the court characterizes an attempt to revive, upon the discovery of the existence of a terre-tenant, after the expiration of five years from entry of the judgment, as "wholly unauthorized," and further says: "Under such circumstances the revival of the judgment (before expiration of five years) against the defendant is all that is possible to the creditor, and it will continue the right to seize and sell the real estate."

A careful study of the course of legislation which has been outlined, and of the many cases in which the several acts have been discussed and construed, convinces us that the purpose of the present statute, as well as of those which preceded it, is to make it necessary for the protection of the creditor, that he revive the judgment every five years, even though he believes and is justified in believing that the property still remains in the hands of his debtor. To hold otherwise, it is believed, would be to place a limitation upon the effect of the act which is not justified by its language, and which, moreover, is not supported by any equitable consideration. In case a debtor, after the lapse of five years from the entry of an unrevived judgment, conveys land to another, the purchaser certainly takes such land free from the lien of the judgment, and a subsequent revival by the creditor would have not the slightest effect, even though the purchaser's deed be unrecorded. This, for the reason that at the time of the conveyance the land is free and clear from the lien of the judgment, except as against the judgment debtor himself. Why should a different conclusion be reached, when the conveyance is made before the lapse of five years? Of course, the purchaser holds subject to the lien of the judgment until the expiration of the fifth year, but from that day, the judgment not having been revived according to statute, the land is freed from its lien, except as regards the judgment debtor himself, and he, of course, has no remaining interest in the land whatever.

The argument may be advanced that by the purchaser's failure to record his deed the judgment creditor is lulled into a sense of security; is led to the belief that the land is still owned by the debtor, and concludes that proceedings for revival are not necessary in order to save his lien. The obvious answer is, that such a conclusion on the part of the creditor is entirely unwarranted. He should know that even though the land still appears to be owned by his debtor, a failure to revive before the lapse of five years will expose his lien to the danger of being defeated at any moment by the conveyance of the premises. His only safeguard is the timely revival of his judgment. If he avails himself of that safeguard, his lien is preserved as against all subsequent liens or proprietary interests, even though he is not aware of their existence. If he neglects it, his lien is lost as against such subsequent liens or proprietary interests, whether or not their existence is known to him. To put it in another way, the only difference between the rights of a terre-tenant whose deed is recorded and one whose deed is unrecorded is, that whereas the former is entitled to notice of the proceedings to revive a judgment, the latter is not. In both cases the proceeding itself is absolutely indispensable if the lien is to be saved.

Since, in the case at bar, the lien of the judgment was lost by the failure to revive within the statutory period, the defendant's title must be upheld. It is therefore unnecessary to consider any question as to the regularity of the subsequent proceedings.

Judgment for defendant.

BOROUGH OF RUSH vs. MOSER.

Place of assessment of seated lands when tract is divided by township line—Act of July 11th, 1842.

STATEMENT OF THE CASE.

And now, January 1st, 1900, it is hereby agreed by and between the parties of the

above stated action that the following case be stated for the opinion of the court in the nature of a special verdict:

H. C. Moser, the defendant above named, is the owner. of a farm containing one hundred acres, lying partly in the Township of Ralpho, where the farm buildings are situated, and partly in the Borough of Rush. The authorities of the Borough of Rush assessed defendant upon the ten acres of his farm lying within the borough limits, while the authorities of Ralpho township assessed him upon the property lying within the limits of said township.

If the court be of the opinion that the ten acres of land lying in the Borough of Rush is assessable there, and not in the Township of Ralpho, where the farm buildings are situate, judgment should be entered for plaintiff, otherwise for defendant.

FRANK and BROCK for the plaintiff.

1. The land should be taxed by the borough. Arthur v. School District, 164 Pa. 410; LaPlume Borough v. Gardner, 148 Pa. 192; Trickett on Borough Law, Vol. 2, page 86.

2. Statute of July 11th, 1842, does not govern this case, for it must be construed strictly, and by such construction it applies only to townships. Duffy v. Philadelphia, 6 Wright 197.

BARR and HEIST for the defendant.

1. The borough cannot assess the land, for the mansion house of the whole tract is situated in the township, and the tract as a whole must be there assessed. Act of July 11th, 1842; P. L. 32 Sec. 59; Bausman v. County of Lancaster, 50 Pa. 211.

NOTE—The Act of June 1st, 1883, is unconstitutional. LaPlume Borough v. Gardner, 148 Pa. 192.

OPINION OF THE COURT.

The argument of this cause has revealed what appears to be an oversight on the part of the Supreme Court of this state. By the Act of July 11, 1842, it was enacted that assessments of seated lands shall be made in the township in which the mansion house is situated, when township lines divide a tract of land, and in the case of Bausman v. County of Lancaster, 50 Pa. 208, it was held that this Act, being remedial, should be liberally construed and that it applies to cases where a tract of land is divided by a line between a township and a borough or a city. "Lands are not the less divided by a township line," said Strong, J., "because that line may also be the line of an adjoining borough or city, and the evils resulting from assessment in parsels by different assessors, rather than assessment in entirety, are the same where part is situate in a township and part in an adjoining borough or city, as where the parts are separated only by a line between two townships." The court also referred to the Act of April 25th, 1850, which enacted that the Act of 1842 should not be construed to extend to lands lying in different townships, the mansion house of which is in an incorporated borough or city, and pointed out the clear implication that the Act of 1842 does extend to lands divided by a line between a township and a borough or city when the mansion house is *not* in the borough or city.

Such appears to have been the state of the law when the Act of June 1, 1883, was passed. That Act was entitled, "An act to require assessors of townships to assess all seated lands in the county in which the mansion house is situated, where county lines divided a tract of land," and provided that "the assessors of the several counties within this Commonwealth shall on seated lands make the assessment in the county in which the mansion house is situate when the county lines divide a tract of land, and when the lines which separate a borough from township, or one borough from another, pass through the lands of any person such lands shall be assessed where the mansion house is situated." Subsequent to this enactment the case of LaPlume v. Gardner, 148 Pa. 192, arose, in which it appeared that defendant owned a farm lying partly in one township, where the mansion house was situated, partly in another township, and partly in the Borough of LaPlume. The borough council assessed defendant upon the portion of his property lying within the borough limits, while the authorities of the township in which the mansion house was situate, assessed him not only upon the portion lying within the limits of that township, but also upon the portion situate within the Borough of LaPlume. The court decided the case in favor of the Borough of LaPlume, declaring that the Act of 1883 was unconstitutional so far as concerned township and

borough lines for the reason that there was nothing in the title of the Act to give notice that lands divided by township and borough lines were affected by it. See Constitution of Pennsylvania, Article 2, § 3.

That the Act of 1883 was properly declared unconstitutional cannot be questioned. But the conclusion of the court that because of the unconstitutionality of the Act of 1883, the land in the borough was not assessable in the township where the mansion house was situate, would seem to be erroneous. The Act of 1842 does not appear to have been repealed, and as construed in Bausman v. Lancaster (*supra*) it precisely covers the case of LaPlume v. Gardner. The only possible explanation of the decision in the latter case is that the Act of 1842 and the case of Bausman v. Lancaster were overlooked by the court. That such was the case, is, perhaps, evidenced by the still later decision of Arthur v. School District, 164 Pa. 410, where Mr. Justice Williams makes the statement that "No power to levy and collect taxes on property outside the lines that bound the district was ever asserted until the Act of June 1, 1883." This decision, like that of LaPlume v. Gardner was based upon the invalidity of the Act of 1883, but it is not open to the objection urged against the soundness of LaPlume v. Gardner, since the mansion house was situated in the city, and the case was, therefore, one which by the Act of 1850 was excepted from the operation of the Act of 1842.

We are of the opinion that the Supreme Court would, if opportunity afforded, overrule the case of LaPlume v. Gardner, as contrary to the provision of the Act of 1842, and we, therefore, hold that in the case at bar the ten acres in the Borough of Rush were not assessable by the borough authorities.

Judgment for defendant.